976.03(8)

D. Arrest on Governor's warrant

1) Def may be arrested wherever found in State

St ex rel Holmes v Spice
68 Wis. 2d 263 (1975)

2) Def held on basis of warrant

   a. Any defect in prior arrest or in execution of fugitive complaint or warrant moot and cannot effect release

976.03(10), (11)

3) Def taken before Judge of Ct of record before release to agent of demanding State

   a. Failure to do so is crime

976.03(10)

4) Judge must inform Def

   a. That demand made for Def's surrender and of specific crime with which charged

People ex rel Harris v Ogilvie
221 NE2d 265 (Ill 1966)

   b. Right to demand and procure Ct-appointed Atty if indigent

   c. Right to test legality of arrest

      - Ct must fix reasonable time to allow application for writ of habeas corpus
      - When writ applied for, notify all parties of time and place of hearing
      - If no writ applied for, Ct has no further jurisdiction

5) No bail provided for by statute

Recommendation

6) All proceedings should be on record

   a. Not required by statute

5. Scope of Habeas Corpus Review

A. To test legality of detention under Governor's warrant of the asylum State

St v Stone
111 Wis. 2d 470, 474 (1983)
St v Ritter
74 Wis. 2d 227 (1976)
74 Yale LJ 78 (1964)

B. Asylum Ct may inquire into four questions

1) Are extradition papers in order and properly authenticated?

2) Was crime substantially charged under law of demanding State?

3) Is petitioner person named in extradition papers (identity)?

4) Was petitioner present in demanding State at time of alleged offense (fugitive status)?

C. Limitation in scope reflects conflict of two basic principles of law

1) Proper relationship between judicial processes of sister States

2) Securing for individuals constitutional rights guaranteed by 14th Amendment

Michigan v Doran
99 SCt 530 (1978)

D. Restrictions on habeas corpus review of extradition proceeding

1) Grant of extradition by asylum State's Governor prima facie evidence that constitutional and statutory requirements met

St v Stone
111 Wis. 2d 470, 474 (1983)

2) Once grant made, Ct in State considering habeas corpus release can do no more than decide whether

a. Extradition documents on their face in order

- Constitutional defects on face of extradition papers may affect legality of arrest in Wis

St v Towne
46 Wis. 2d 169 (1970)
St ex rel Foster v Uttech
31 Wis. 2d 664 (1966)

b. Petitioner charged with crime in demanding State

St v Ritter
74 Wis. 2d 227 (1976)

- Ct of asylum State may take judicial notice of statutes of demanding State to determine whether crime has been charged

St v Stone
111 Wis. 2d 470, 476 (1983)

- Wis can only inquire whether finding of probable cause made by judicial officer in demanding State

St ex rel Ehlers v Endicott
188 Wis. 2d 57 (Ct. App. 1994)

- Not necessary that complaint or arrest warrant contain an express statement of probable cause. Ct may take judicial notice of demanding State's statutory requirements

c. Petitioner is person named in extradition request

St ex rel Clayton v Wolke
69 Wis. 2d 363 (1975)

- In determining identity, presumption that fugitive is person sought by demanding State must be overcome by clear and convincing evidence

d. Petitioner is fugitive

Illinois ex rel McNichols v Pease
28 SCt 58 (1907)
St ex rel Rodencal v Fitzgerald
164 Wis. 2d 411 (1991)

E. Def has right to evidentiary hearing on claim that not fugitive from justice

Biddinger v Comm'r of Police
38 SCt 41 (1917)
St ex rel Rodencal v Fitzgerald
164 Wis. 2d 411 (1991)

1) Issue at hearing: Was Def present in demanding State at time crime alleged to have been committed?

St ex rel Kohl v Kubiak
255 Wis. 186 (1949)

2) Burden on Def to show by competent evidence that not fugitive from justice of demanding State

a. Must overcome presumption arising from extradition warrant that Def is fugitive

F. Ct should <u>not</u> consider following

976.03(20)
St ex rel Welch v Hegge
54 Wis. 2d 482 (1972)

1) Guilt or innocence of Def, except as testimony relevant to issue of identity or fugitive status

St ex rel Sieloff v Golz
80 Wis. 2d 225 (1977)

2) Sufficiency of indictment

Munsey v Clough
25 SCt 282 (1905)
St ex rel Welch v Hegge
54 Wis. 2d 482 (1972)

3) Question of alibi

Drew v Thaw
35 SCt 137 (1914)

4) Motive for seeking extradition

New Mexico v Reed
118 SCt 1860 (1998)
Hogan v O'Neill
41 SCt 222 (1921)

5) Motive of Def in leaving demanding State

St ex rel Lykins v Steinhorst
197 Wis. 2d 875
(Ct. App. 1995)

6) Whether original arrest or detention was illegal

6. Findings

A. If custody found lawful, quash habeas corpus and return Def to custody of sheriff for relinquishment to demanding State under Governor's warrant

B. If custody found unlawful, discharge Def from custody

DETAINERS

1. Definition

US v Mauro
98 SCt 1834 (1978)

A. Detainer is notification

1) Filed with institution in which prisoner is serving a sentence

2) Advising that prisoner is wanted to face pending criminal charges in another jurisdiction

St v Eesley
225 Wis. 2d 248 (1999)

3) Writ of habeas corpus *ad prosequendum* is not a detainer and does not trigger the anti-shuttling (§ 976.05(4)(e)) or speedy trial (§ 976.05(4)(c)) provisions of Ch 976

St v Onheiber
2009 WI App 180
322 Wis. 2d 708

4) Nationwide arrest warrant is a detainer

B. Wis has adopted separate procedures to deal with

976.05, 976.06

1) Interstate detainers

971.11

2) Intrastate detainers

976.05

2. Interstate Procedure

A. Commencement

976.05(4)

1) Commenced by State by filing written request for temporary custody with appropriate authorities in state of prisoner's incarceration

976.05(3)

2) Commenced by prisoner by sending to prosecuting officer and appropriate Ct

a. Written notice of place of incarceration

b. Request for final disposition of charges, and

c. Certificate from appropriate authority having custody stating terms of incarceration and other dept decisions relating to prisoner

B. Time limits

976.05(3)(a)
St v Miller
2003 WI App 74
261 Wis. 2d 866

1) If commenced by prisoner (voluntary request), trial must begin within 180 days after request

St v Thomas
2013 WI App 78
348 Wis. 2d 699
St v Blackburn
214 Wis. 2d 372
(Ct. App. 1997)

a. Prisoner must strictly comply with formal notice requirements

St v Townsend
2006 WI App 177
295 Wis. 2d 844

b. "Sending" State's failure to notify prisoner of detainer does not deprive prisoner of right to seek prompt disposition of charges in "receiving" State

976.05(4)
St v Aukes
192 Wis. 2d 338
(Ct. App. 1995)

2) If commenced by State, trial must begin within 120 days after prisoner's arrival

St v Miller
2003 WI App 74
261 Wis. 2d 866

3) Time limits tolled if good cause shown in open Ct

St v Grzelak
215 Wis. 2d 577
(Ct. App. 1997)

4) Time limits stop running on date trial begins or no contest or guilty plea entered

St v Tarrant
2009 WI App 121
321 Wis. 2d 69

5) Time limits are not tolled merely by withdrawing the detainer or the request for extradition; case must be dismissed to stop the clock

St v Aukes
192 Wis. 2d 338
(Ct. App. 1995)

C. Any time running for the parties to pursue an appeal not included in calculating time limits

D. Hearing

976.06

1) Prisoner entitled to hearing within 30 days after receipt of request

St v Sykes
91 Wis. 2d 436
(Ct. App. 1979)

a. Failure to hold hearing within time specified should result in prisoner's release from the detainer

Aiello v St
166 Wis. 2d 27
(Ct. App. 1991)

b. However, § 976.06 does not proscribe the filing of multiple detainers

976.05(4)(a)
St ex rel Kerr v McCaughtry
183 Wis. 2d 54
(Ct. App. 1994)

c. If hearing not held within 30 days, DA must <u>again</u> obtain necessary documentation that Ct having jurisdiction of such indictment has approved, recorded, and transmitted the request

976.06

2) Scope of hearing confined to request for temporary custody and identity of person sought by requesting State

a. Shall not consider guilt or innocence of prisoner

976.05(4)(e)
Alabama v Bozeman
121 SCt 2079 (2001)

E. The literal language of the anti-shuttling provision of the Interstate Agreement on Detainers bars any further criminal proceedings when Def returned to original place of imprisonment before trial

St v Nonahal
2001 WI App 39
241 Wis. 2d 397

1) Protections of anti-shuttling provision may be waived

3. Intrastate Detainer Procedure

971.11

A. Procedures substantially similar to procedures on Interstate detainers

1) Applies to inmates of a State prison

2) Upon request of inmate, warden must send demand for prompt disposition of pending criminal case to DA

3) DA must bring case on for trial within

a. 120 days after receipt of request in felony charge

b. 90 days after receipt of request in misdemeanor charge

St v Davis
2001 WI 136
248 Wis. 2d 986
St v Lewis
2004 WI App 211
277 Wis. 2d 446

B. Ct has discretion to dismiss with or without prejudice for noncompliance with time limit

CR 45
ELECTRONIC SURVEILLANCE

1. Constitutionality ..... CR 45-3
2. Procedure ..... CR 45-3
3. Recording Interceptions ..... CR 45-7
4. Inventory (Notice) to Person Monitored ..... CR 45-8
5. Pretrial Use of Intercepted Communications ..... CR 45-9
6. Trial Use of Intercepted Communications ..... CR 45-9
7. Effect of Consent of One Party to the Communication ..... CR 45-10

1. Constitutionality

St ex rel Hussong v Froelich
62 Wis. 2d 577 (1974)

A. Electronic surveillance control law valid enactment that meets 4th Amendment and all other constitutional requirements

St v Gil
208 Wis. 2d 531
(Ct. App. 1997)

B. Surveillance control law premised on concept of controlling law enforcement's conduct to protect citizens' privacy rights

St v House
2007 WI 79
302 Wis. 2d 1

2. Procedure

A. Application

968.28

1) Approval of both AG and any DA (generally DA in Cty where criminal investigation pending) necessary

968.28

2) Made to Chief Judge of Judicial Administrative District in Cty where interception to occur

968.28

3) Authorization limited to interception that may provide or has provided evidence of commission of

a. Homicide

b. Felony murder

c. Kidnapping

d. Commercial gambling

e. Bribery

f. Extortion

g. Dealing in controlled substances or controlled substance analogs

h. Computer crime that is felony under § 943.70

i. Sexual exploitation of a child

j. Child trafficking

k. Child enticement

l. Use of a computer to facilitate child sex crime

m. Soliciting a child for prostitution

n. Any conspiracy to commit foregoing offenses

968.30

4) Must be upon oath or affirmation

968.30(1)
St ex rel Hussong v Froelich
62 Wis. 2d 577 (1974)

B. Contents of application must conform to statute, including

968.30(1)(a)

1) Identity of applicant and persons authorizing applicant to make application

968.30(1)(b)

2) Full and complete statement of facts and circumstances justifying applicant's belief order should issue, including

968.30(1)(b)1.

a. Details of particular offense

968.30(1)(b)2.

b. Particular description of nature and location of facilities from which communication to be intercepted or particular description of nature and location of place where communication to be intercepted

968.30(1)(b)3.

c. Particular description of type of communications sought to be intercepted

968.30(1)(b)4.

d. Identity of person, if known, committing offense and whose communications to be intercepted

968.30(1)(c)

3) Full and complete statement of other investigative procedures tried and failed

a. Why other investigative procedures reasonably appear unlikely to succeed, if tried

b. Why other investigative procedures reasonably appear too dangerous

968.30(1)(d)

4) Statement of time required for interception to be maintained

a. If interception does not automatically terminate when described communication obtained, particular description of facts establishing probable cause to believe additional described communications will occur

968.30(1)(e)

5) Full and complete statement of facts concerning all previous applications involving any of same persons, facilities, or places known to applicant, including

a. Ct to which previous applications made

b. Action taken by Ct on each previous application

968.30(1)(f)

6) When application for extension of time for interception to be maintained

a. Statement of results thus far obtained by interception, or

b. Reasonable explanation of failure to obtain objective

C. Hearing

968.30(2)

1) May be required to support application

968.30(2)

2) If held, oral testimony must be reduced to writing

D. Order

968.30(3)

1) Must be supported by findings showing probable cause that

968.30(3)(a), 968.28
St ex rel Hussong v Froelich
62 Wis. 2d 577 (1974)

a. Person committing, committed, or about to commit homicide, felony murder, kidnapping, commercial gambling, bribery, extortion, dealing in controlled substances (or controlled substance analogs), computer crime that is felony under § 943.70, sexual exploitation of a child, child trafficking, child enticement, use of a computer to facilitate child sex crime, soliciting a child for prostitution, or any conspiracy to commit foregoing offenses

968.30(3)(b)

b. Evidence concerning offense will likely be obtained through interception

968.30(3)(d)

c. Communication facilities used or about to be used in connection with offense, or leased by, listed in name of, or commonly used by, person suspected

968.30(3)(c)

d. Other investigative procedures tried and failed, or appear unlikely to succeed or too dangerous

968.30(4)

2) Contents of order must comply with statute

968.27(4)(a)
St v Smith
149 Wis. 2d 89 (1989)

a. Radio portion of cordless telephone communication transmitted between handset and base unit not protected by statute

968.30(9)(b)2.

3) State may appeal order denying application

E. Time period of authorization

968.30(5)

1) Cannot exceed 30 days without judicial extension

a. 30-day period begins on earlier of

- Day on which interception under order begins, or
- 10 days after order entered

968.30(5)

2) Extension only granted upon application and cannot exceed 30 days

968.30(6)

3) Ct may require progress reports

968.30(7)

3. Recording Interceptions

968.30(7)(a)

A. If possible, recorded on tape, wire, or comparable device

1) In way that will protect recording from alteration or editing

968.30(7)(b)

B. Recording filed with Ct issuing order, sealed, and kept in Ct's custody

968.30(7)(a)

C. Preserved for 10 years and destroyed only on order of issuing Judge

968.30(7)(b)
968.29(1), (2)

D. No disclosure except by order of Ct for good cause

E. Concealed radio transmitters may be used

US v Knotts
103 SCt 1081 (1983)

1) Technological enhancement of usual surveillance techniques raises no constitutional issue visual surveillance would not also raise

US v Karo
104 SCt 3296 (1984)

a. Beepers may not be used to monitor activities inside private residence without warrant

968.30(7)

4. Inventory (Notice) to Person Monitored

968.30(7)(d)

A. Served on persons named in order or application and other parties to interception

B. Service within 90 days after filing of application or termination of period of order or extension(s) thereof

C. Contents of inventory

968.30(7)(d)1.

1) Fact of entry of order or application

968.30(7)(d)2.

2) Date of order and period of authorization or denial of application

968.30(7)(d)3.

3) Whether wire, electronic, or oral communications intercepted

968.30(7)(e)

4) On ex parte showing of good cause, Judge may postpone serving inventory

a. Shall review postponement at end of 60 days, and

b. Good cause must be shown before further postponement

968.30(7)(e), (9)(a)

5) Inspection of intercepted communication and application

a. Limited to what Judge determines to be in interest of justice

968.29(2)
St v Gilmore
201 Wis. 2d 820 (1996)

5. Pretrial Use of Intercepted Communications

A. Prosecutor may include contents of legally intercepted communications in criminal complaint

1) State must file complaint under seal

St v House
2007 WI 79
302 Wis. 2d 1

6. Trial Use of Intercepted Communications

968.30(8)

A. Parties must be furnished with copy of Ct order and application at least 10 days before trial, hearing, or proceeding

968.30(8)

B. Judge may waive notice, if

1) Impossible to furnish information within 10-day period, and

2) Party not prejudiced by delay in receiving information

968.30(9)

C. Motion to suppress intercepted communication (or evidence derived from the communication) may be made before trial on following grounds

968.30(9)(a)

1) Communication illegally intercepted

St v Smith
149 Wis. 2d 89 (1989)

a. Person using cordless phone has no reasonable expectation of privacy in conversation

b. Party using normal landline phone may well have expectation of privacy when unknowingly conversing with another using cordless phone

968.30(9)(a)

2) Order of authorization or approval insufficient on its face

968.30(9)(a)

3) Interception not made in conformity with order of authorization or approval

St v Maloney
161 Wis. 2d 127
(Ct. App. 1991)

a. Even though statutory requirements for recording telephone conversation violated, so long as witness's receipt of communication does not rely on intercept, witness may testify from personal experience and recollection of conversation

968.30(9)(b)1.

D. State has right to appeal from order suppressing intercepted communications

1) Shall certify that appeal not for purposes of delay

7. Effect of Consent of One Party to the Communication

968.29(3)(b)

A. Recorded (intercepted) one-party consent communication may be disclosed in any felony Ct proceeding

St v Gil
208 Wis. 2d 531
(Ct. App. 1997)

B. EXCEPT when plain hearing doctrine applies

1) When officers are conducting otherwise-authorized electronic, aural surveillance (warrant or one-party consent felony surveillance), evidence of other crime not otherwise subject to authorized electronic, aural surveillance may be used in case-in-chief if the evidence inadvertently fell within officers' plain hearing

2) Ct must be certain that law enforcement just inadvertently came upon evidence

St v Waste Mgmt
81 Wis. 2d 555 (1978)

C. In non-felony proceedings, evidence obtained from one-party consent search cannot be admitted in evidence in case-in-chief, but can be turned over to law enforcement officials

US v Caceres
99 SCt 1465 (1979)
St ex rel Arnold v Cty Ct
51 Wis. 2d 434 (1971)
US v White
91 SCt 1122 (1971)

D. Intercepted recorded conversation with consent of one party not violative of federal Constitution

St v Christensen
2007 WI App 170
304 Wis. 2d 147
St v Riley
2005 WI App 203
287 Wis. 2d 244

1) Consent may be implied

2) Jail inmate who is given meaningful notice that institutional phone calls are subject to surveillance implicitly consents to surveillance by engaging in conversation on such phones

St v Turner
2014 WI App 93
356 Wis. 2d 759

3) Minor may consent so long as consent is voluntary

St v Smith
72 Wis. 2d 711 (1976)

E. Testimony concerning content of tape recording is admissible

St v Albrecht
184 Wis. 2d 287
(Ct. App. 1994)

1) Def can "open door" to tape's admission through extensive reference to transcript of recording during examination

St v Smith
72 Wis. 2d 711 (1976)
St v Albrecht
184 Wis. 2d 287
(Ct. App. 1994)

2) Tape can be admitted as "defensive impeachment evidence" in rebuttal, to

a. Present the "tone" in which statements were made

b. Provide other nuances not readily ascertainable from transcript

CR 46
WRITS

1. Certiorari: *See Civil Benchbook* CV 26 ..... CR 46-3

2. Habeas Corpus: *See Civil Benchbook* CV 27 ..... CR 46-3

1. **Certiorari:** ***See Civil Benchbook*** **CV 26**
2. **Habeas Corpus:** ***See Civil Benchbook*** **CV 27**

JUVENILE
CONTEMPT
GRAND JURY
JOHN DOE
INQUESTS

CR 47
CONTEMPT OF COURT

1. Power of Court ..... CR 47-3
2. Definition of Contempt ..... CR 47-4
3. Summary Proceedings ..... CR 47-6
4. Non-Summary Proceedings ..... CR 47-8

1. Power of Court

In re Kading
70 Wis. 2d 508, 543b
(1975)

A. Ct of general jurisdiction has inherent power to hold those who disobey its lawful order in contempt

DLD v Circuit Ct
(Int of DLD)
110 Wis. 2d 168, 182
(1983)

1) To be used sparingly, with utmost sensitivity

Currie v Schwalbach
132 Wis. 2d 29, 44
(Ct. App. 1986)

2) Not to be used arbitrarily, capriciously, or oppressively

St v Carpenter
179 Wis. 2d 838
(Ct. App. 1993)
McGee v
Racine Cty Cir Ct
150 Wis. 2d 178
(Ct. App. 1989)
66 MLR 369 (1983)

3) Contempt proceedings are sui generis and are neither civil nor criminal prosecutions within the ordinary meaning

a. Punitive contempt may not be considered a conviction for § 939.62 penalty enhancement

4) Appellate Cts carefully scrutinize contempt findings on review

McGee v
Racine Cty Cir Ct
150 Wis. 2d 178
(Ct. App. 1989)

B. Ct's power subject to reasonable legislative regulation and limitation

Comment

1) Statutory contempt proceedings under Ch 785 do not preclude specific remedies in other statutes

2) Broad statutory construction intended

Recommendation

3) Violations of pretrial discovery, scheduling orders and the like should be handled by sanctions provided as specific remedies in statutes outside Ch 785

C. Juvs may be held in contempt

DLD v Circuit Ct
(Int of DLD)
110 Wis. 2d 168 (1983)
St v Aaron D
(Int of Aaron D)
214 Wis. 2d 56
(Ct. App. 1997)
BLP v Circuit Ct
(In re BLP)
118 Wis. 2d 33
(Ct. App. 1984)

1) Juv Ct must follow Ch 785 procedures, except as limited by Ch 938

2) See **JV 11, Postdisposition, Juvenile Benchbook**

2. Definition of Contempt

A. Intentional misconduct in presence of Ct

785.01(1)(a)
St v VanLaarhoven
90 Wis. 2d 67
(Ct. App. 1979)

1) Intentional

Shepard v
Cir Ct of Outagamie Cty
189 Wis. 2d 279
(Ct. App. 1994)

a. Def appearing intoxicated at time of criminal plea and sentencing hearing is engaging in intentional misconduct and can be sanctioned by summary contempt

2) Misconduct

Currie v Schwalbach
132 Wis. 2d 29
(Ct. App. 1986)

a. Interferes with Ct proceeding

b. Interferes with administration of justice

c. Impairs respect due Ct

785.01(1)(b)
In re Kading
70 Wis. 2d 508 (1975)

B. Disobedience, resistance, or obstruction of authority, process, or order of Ct

St v Dickson
53 Wis. 2d 532 (1972)

1) Notice from Clerk of Ct not order of Ct

2) Although sanctions for failure to comply with scheduling, discovery, or pretrial orders can be found in specific statutes, disobedience of order compelling compliance may be punishable by contempt

St v Chinavare
185 Wis. 2d 528
(Ct. App. 1994)

3) Contempt may be charged for violation of Ct order for acts committed by a third party at direction of Def

785.01(1)(c)

C. Refusal of witness to appear, be sworn, or answer question

972.08(1)
St v Gonzalez
172 Wis. 2d 576
(Ct. App. 1992)

1) To be punished with § 972.08(1) sanctions for failure to testify "at trial," the trial—not a pretrial hearing—must have commenced

a. However, § 972.08(1) says, "Whenever any person refuses to testify … when required to do so before any grand jury, in a proceeding under s. 968.26 or at a preliminary examination, criminal hearing or trial for the reason that the testimony or evidence required of him or her may tend to incriminate him or her or subject him or her to a forfeiture or penalty, the person may nevertheless be compelled to testify or produce the evidence by order of the court on motion of the district attorney…"

Recommendation

- In making record, clarify nature of proceeding

785.01(1)(d)

D. Refusal to produce record, document, or other object

3. Summary Proceedings

A. Requirements for using summary contempt powers

785.03(2)
Anderson v
Milw Cty Cir Ct
219 Wis. 2d 1 (1998)
Oliveto v
Crawford Cty Cir Ct
194 Wis. 2d 418 (1995)
Casey v Carlson
146 Wis. 2d 166
(Ct. App. 1988)

1) Contemptuous act must be committed in actual presence of Ct

Gower v Cir Ct
154 Wis. 2d 1 (1990)

a. Failure to appear not basis for summary contempt because it does not occur in presence of Ct

b. Tardiness of counsel does not occur in presence of Ct and cannot be sanctioned by summary contempt

785.03(2)

2) Sanction must be imposed to preserve order in Ct

3) Sanction must be imposed to protect authority and dignity of Ct

4) Sanction must be imposed immediately after contempt

Lemmons v
Racine Cty Cir Ct
148 Wis. 2d 740
(Ct. App. 1989)

a. Contemnor's immediate voluntary departure from presence of Ct does not defeat ability of Ct to act as soon as reasonably possible to punish the contempt

B. In general

1) Need for expediency justifies disposal of fundamental and routine rights, including notice of charges, presumption of innocence, prosecutorial burden of proof, trial by jury, right to counsel, and confrontation of accusers

St v VanLaarhoven
90 Wis. 2d 67
(Ct. App. 1979)

2) Summary contempt should not be used if Judge attacked such that personal feelings could reasonably be expected to have been affected, unless absolutely necessary to preserve order and protect authority and dignity of Ct

785.03(2)
Comment

3) When Ct proceeds summarily, may not proceed with further punitive sanctions

785.04(3)

4) If contemptuous conduct continuing, remedial action may be commenced even though summary proceeding used

785.03(2)

C. Procedure

1) Must be done immediately following contemptuous conduct

Oliveto v
Crawford Cty Cir Ct
194 Wis. 2d 418 (1995)

2) Offender has right of allocution

3) Offender brought before Ct, findings made, and penalty imposed

D. Ct must make specific findings

1) (Date)(Time) Branch _____, _____ County Circuit Court being in regular session; and

2) (Name of action)(Case no.) being then on trial before the Court/jury; and

3) (Name of contemnor) did then and there, in open Court, in the immediate view of and in the presence of the Court (and jury), engage in disorderly, contemptuous, and insolent behavior, directly tending to interrupt the Court's proceedings and to impair the authority and dignity of this Court; and

4) In that said (name of contemnor) did: (Specify each contemptuous act); and

5) The disorderly, contemptuous, and insolent behavior of (name of contemnor) has, beyond a reasonable doubt, seriously destroyed the order, authority, and dignity of this Court and must be dealt with under the Court's inherent and statutory powers to summarily punish such conduct

785.04(2)(b)

E. Sanctions available

1) Fine of not more than $500

2) Or, confinement in Cty jail

a. Not to exceed 30 days

785.07

b. Confinement order must be issued by a Judge

3) Or both

4. Non-Summary Proceedings

A. Remedial sanctions

1) Definition

785.01(3)

a. Sanction imposed for purpose of terminating continuing contempt of Ct

St ex rel NA v GS
156 Wis. 2d 338
(Ct. App. 1990)

- If sanction is imprisonment, must be conditional upon contemnor's performing act that ends sentence and results in contemnor's discharge

- Purge order must clearly spell out what contemnor must do to purge

Larsen v Larsen
159 Wis. 2d 672
(Ct. App. 1990)

- Purge condition must be related to cause or nature of contempt

- Required action must be within power of contemnor
- Contemnors must "hold the keys to their own jails"

785.03(1)(c)

b. May be tried jointly with punitive action

2) Standing

785.03(1)(a)
St v King
82 Wis. 2d 124 (1978)

a. Any person aggrieved by contempt of Ct has standing to file motion for remedial sanction in principal proceeding

785.06

b. Ct Comm'r, Municipal Ct, or State agency conducting proceeding may petition Circuit Ct for sanction for contemptuous conduct at such proceeding

c. If contemnor not party to principal proceedings

- May be joined under § 803.06

Recommendation

- Limit to remedial sanction proceedings only

Evans v Luebke
2003 WI App 207
267 Wis. 2d 596

3) Procedure

a. Ct must give notice to alleged contemnor

Upper Lakes Shipping v Seafarers' Union
23 Wis. 2d 494 (1964)

b. Ct must conduct evidentiary hearing

- Before Judge
- Without jury

c. Alleged contemnor entitled to counsel

4) Findings and conclusions

a. Alleged contemnor committing certain acts or omissions, and

b. Acts or omissions intentional, contemptuous, and without legal justification

Balaam v Balaam
52 Wis. 2d 20 (1971)

5) Alleged contemnor's burden, after proof of conduct

a. Must prove acts or omissions not contemptuous, or

b. Must prove legal justification for conduct

785.04(1)

6) Sanctions available

a. Payment of money sufficient to compensate injured party

b. Forfeiture not to exceed $2,000 per day for each day contempt continues

c. Order designed to ensure compliance with prior order

785.04(1)(b)

d. Confinement

- Not to exceed 6 months or until contemnor complies, whichever is less

785.07

- Order for confinement must be issued by a Judge

- Proper when conduct involved disobedience of Ct order, or refusal to appear, testify, or produce a record, a document, or an object

785.05

- Not proper when conduct involved failure to appear/pay nonmoving traffic violation

785.04(1)(e)

e. Any other sanction if Ct finds foregoing would be ineffectual

f. No remedial sanction may be imposed unless conduct continuing at time of sanction

Recommendation

g. Consider option of imposing sanction with right to purge in specified time

B. Punitive sanctions

1) Definition

785.01(2)

a. Sanction imposed to punish past contemptuous conduct

St ex rel NA v GS
156 Wis. 2d 338
(Ct. App. 1990)

- Sentence of imprisonment for definite period is punitive sanction
- Contemnor cannot undo or remedy what has been done and cannot shorten term by promising not to repeat offense

785.04(3)

b. Can be imposed for past conduct even though similar present conduct continuing contempt

785.03(1)(b)

2) Procedure

a. Initiated by filing criminal complaint

- Commenced only by AG, DA, or Special Prosecutor
- May be requested by aggrieved party, Judge, or at prosecutor's own initiative
- Ct Comm'r, Municipal Ct, or State agency conducting proceeding may petition Circuit Ct for sanction for contemptuous conduct at that proceeding

785.06

b. Complaint to recite sanction sought and alleged contemptuous conduct

St v King
82 Wis. 2d 124 (1978)
Ferris v
St ex rel Maass
75 Wis. 2d 542 (1977)

c. Alleged contemnor entitled to due process

- Trial and proceedings same as for any criminal case

St v King
82 Wis. 2d 124 (1978)

- Burden on State to prove guilt beyond a reasonable doubt

785.03(1)(b)

d. If conduct involved disrespect or criticism of Judge, same Judge disqualified from presiding, unless Def consents

3) Findings and conclusions

a. Def intentionally committed certain acts or omissions, and

b. Acts or omissions were contemptuous

785.04(2)(a)

4) Sanctions available

a. Fine of not more than $5,000

b. Or, confinement in Cty jail

- Not to exceed 1 year

785.07

- Order for confinement must be issued by a Judge

785.05

- Def cannot be confined if contempt based on failure to appear or pay for nonmoving traffic violation

785.04(2)(a)

c. Or both

CR 48
GRAND JURY/
JOHN DOE PROCEEDINGS

GRAND JURY ..... CR 48-3

1. Purpose ..... CR 48-3
2. Powers ..... CR 48-3
3. Convening ..... CR 48-3
4. Participants ..... CR 48-4
5. Secrecy ..... CR 48-5
6. Witnesses ..... CR 48-6
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JOHN DOE PROCEEDINGS ..... CR 48-10

1. Definition and Initiation ..... CR 48-10
2. Role of Judge in John Doe Proceedings ..... CR 48-11
3. Disposition ..... CR 48-16
4. John Doe Problems ..... CR 48-17

GRAND JURY

1. Purpose

Report of Grand Jury: Williams 204 Wis. 409 (1931)

Report of Grand Jury: Williams 204 Wis. 409 (1931)

A. To discover wrongdoing and, upon sufficient evidence, to accuse individuals by indictment so that proper prosecution of offenders may occur

B. Investigates whether crime committed and by whom

2. Powers

US v Morton Salt Co 70 SCt 357 (1950)

A. Prosecution may investigate merely on suspicion that law being violated

B. May investigate just because Grand Jury wants assurance that law not being violated

US v Dionisio 93 SCt 764 (1973)

C. Free to pursue investigations unhindered by external influence or supervision

1) So long as it does not infringe on legitimate rights of any witness called before it

St v Nowakowski 67 Wis. 2d 545 (1975)

D. Grand Jury convened to investigate allegations of criminality against specific person does not deny that person due process

3. Convening

A. DA usually makes written application or petition containing

1) Description of nature of suspected criminal activity

3) Prayer that Judge issue order for Grand Jury

968.40(1)

B. Written order entered by Judge to Clerk of Circuit Ct requiring Clerk to select Grand Jury panel list within specified reasonable time

968.40(1)

1) Panel list no fewer than 75 nor more than 150 members

968.40(3), (4)

2) Statutory procedures followed

968.40(4)

3) 17 members constitute jury

968.48

4) No business may be transacted unless 14 jurors in attendance

968.40(6)

C. Grand jurors serve for 31 consecutive days

1) May serve additional days, if necessary to complete service in particular proceeding

968.40(6)

2) May be discharged by Judge at any time

4. Participants

A. Judge orders jurors summoned and supervises

968.47

B. DA has duty to attend whenever required by Grand Jury

968.40(3)

1) Examines panel members under oath or affirmation about qualifications to serve

968.47

2) Examines witnesses

3) Gives advice on legal matters

4) Issues subpoenas and other process to bring witnesses before Grand Jury

5) Draws bills of indictment

968.42

C. Grand Jury selects presiding juror and clerk

968.43(1)

D. Employs one or more reporters

1) To attend sessions

2) To make and transcribe verbatim record of all proceedings

5. Secrecy

Butterworth v Smith
110 SCt 1376 (1990)

A. Grand Jury proceedings may be secret during pendency of proceedings

1) Interest served by secrecy

a. Prospective witnesses less hesitant to come forward voluntarily

b. Witnesses less vulnerable to retribution or inducements in testimony

c. Reduces risk that targets of investigation will flee or try to influence individual Grand Jury members

d. Exonerated persons not exposed to public ridicule

St v Unnamed Def
150 Wis. 2d 352 (1989)
St ex rel Steven v Cir Ct
141 Wis. 2d 239 (1987)

2) CAUTION: Wis has presumption that Ct proceedings open to public; therefore any order for secrecy should properly balance any compelling need for secrecy against public interest in open proceedings

968.41
968.43(2)

3) Grand jurors and reporters must take oath or affirmation of secrecy

968.44

4) Oath or affirmation of secrecy administered by presiding juror or DA to witnesses before testifying

Butterworth v Smith
110 SCt 1376 (1990)

5) After term of Grand Jury ended, witness may not constitutionally be prohibited from disclosing own testimony

St v
Waste Mgmt of Wis, Inc
81 Wis. 2d 555, 578
(1978)

B. Grand Jury proceedings need not be recorded, unless so ordered at direction of Judge

6. Witnesses

A. Usually subpoenaed

968.44

B. Sworn to secrecy and to tell truth by DA or presiding juror

US v Dionisio
93 SCt 764 (1973)

C. Subpoena to appear not seizure within meaning of 4th Amendment even though inconvenient or burdensome

US v Dionisio
93 SCt 764 (1973)
St v Knops
49 Wis. 2d 647 (1971)

1) No person has justifiable expectation of immunity from Grand Jury subpoena

US v Dionisio
93 SCt 764 (1973)

2) 4th Amendment does provide protection from subpoena *duces tecum* too sweeping in terms to be reasonable

D. Witness has absolute duty to answer all questions, subject only to

US v Mandujano
96 SCt 1768 (1976)

1) Valid 5th Amendment privilege against self-incrimination

Ch 905

2) Valid statutory privilege

E. Claim of privilege against self-incrimination

Maness v Meyers
95 SCt 584 (1975)
St ex rel Rizzo v Cty Ct
32 Wis. 2d 642 (1966)

1) Personal privilege against self-disclosure that witness reasonably believes could be used in criminal prosecution against the witness or could lead to other evidence that might be so used

Doe v US
108 SCt 2341 (1988)
St v Gonzalez
2014 WI 124
359 Wis. 2d 1

2) Does not prohibit compelling witness to provide physical evidence that does not have a testimonial aspect

St ex rel Rizzo v Cty Ct
32 Wis. 2d 642 (1966)

3) Does not bar testimony about criminal acts barred by statute of limitation

Braswell v US
108 SCt 2284 (1988)
St v Alioto
64 Wis. 2d 354 (1974)

4) Does not protect books and records of "collective entities" like partnerships, corporations, and banks

Doe v US
108 SCt 2341 (1988)

a. Accused can be compelled to sign nonspecific consent for release of documents without violating 5th Amendment privilege against self-incrimination

- Signing not testimonial in nature, so long as form does not acknowledge existence or accused's control over account

Fisher v US
96 SCt 1569 (1976)

5) Does not protect documents in possession of agent

6) Privilege must be claimed

St v Hall
65 Wis. 2d 18, 28 (1974)

a. If privilege not claimed and witness gives testimony without compulsion by Ct to testify, witness not immune from prosecution

St v Hall
65 Wis. 2d 18, 28 (1974)

7) If witness claims privilege, cannot be compelled to answer question, unless granted immunity from prosecution

a. Questioning need not cease

b. Any further questions can be refused on grounds of privilege

F. Compelling testimony/grant of immunity

972.08(1)

1) If witness takes 5th Amendment, may nonetheless be compelled to testify or produce such evidence by order of Ct on motion of DA

Hebel v St
60 Wis. 2d 325, 330 (1973)
Shelley v St
89 Wis. 2d 263, 277 (Ct. App. 1979)

a. Ct has no discretion to grant immunity without motion by DA

St ex rel Newspapers Inc v Cir Ct
65 Wis. 2d 66 (1974)

2) Order granting or denying motion to compel must be made in open Ct

St ex rel Newspapers Inc v Cir Ct
65 Wis. 2d 66 (1974)

a. Details of DA's motion (such as questions witness to be compelled to answer) should not be recited in open Ct

b. State only that DA made a motion to compel testimony (or produce record) of named witness and that motion granted or denied

972.08(1)
US v Mandujano
96 SCt 1768 (1976)

3) If witness then answers, not liable for any forfeiture or penalty for or on account of any transaction, matter, or thing concerning which witness testifies

972.08(1)

a. Witness not exempt from prosecution and punishment for perjury or false swearing committed while testifying

972.08(2)

4) Upon witness's continued refusal, Ct may summarily order confinement until witness willing to give testimony or until Grand Jury term concluded, but in no case exceeding 1 year

972.08(2)

a. No bail pending determination of appeal taken from order of confinement

G. Right to Counsel

968.45(1)

1) Witness may retain, confer with, and receive legal advice and assistance of counsel

2) Not entitled to presence of Atty while giving testimony before Grand Jury

St v Hall
65 Wis. 2d 18 (1974)

3) Witness may confer with Atty outside Grand Jury room before deciding whether to answer questions that may tend to be self-incriminating

976.02(3)

H. Witness may be extradited to Wis to testify from another state that is a party to the Uniform Act for Extradition of Witnesses in Criminal Actions

7. Indictment

Black's Law Dictionary
891 (10th ed 2014)

A. Indictment is formal accusation of a crime, presented to a Ct for prosecution against accused person

1) In writing

2) Found by Grand Jury legally convoked and sworn

3) Presented to Ct in which Grand Jury empaneled

St ex rel Welch v Waukesha Cty Ct
52 Wis. 2d 221 (1971)

B. Indictment properly returned when evidence presented excites in jury's mind, after careful consideration, honest, reasonable belief that accused committed offense charged

968.48

C. Indictment must be agreed to by at least 12 jurors

968.06

D. Upon indictment, complaint issued

1) All proceedings thereafter same as if person [illegible] under § 968.02 as normally done

971.02(1)

E. No indictment charging a felony may be filed until noncorporate Def has had prelim

1) Def may waive prelim in writing or in open Ct

JOHN DOE PROCEEDINGS

NOTE: 2015 Wis. Act 64, effective 10/25/15, made a variety of changes to the statutes governing John Doe proceedings, including the following: prohibits John Doe proceedings for certain criminal violations and generally limits the scope of proceedings; prohibits reserve Judges from conducting John Doe proceedings; specifies who may be covered by a secrecy order; generally limits a proceeding to six months; and provides that a search warrant in a proceeding must be issued by a Judge other than the presiding Judge.

1. Definition and Initiation

968.26(1b)(a)
St v Unnamed Def
150 Wis. 2d 352 (1989)
St ex rel Stevens v Cir Ct
141 Wis. 2d 239 (1987)
Wis JI-Cr SM-12

A. Proceeding conducted by a Judge to determine whether certain crimes were committed and by whom

968.26(1b)(b)

B. "Judge" does not include a "reserve Judge"

St v Washington
83 Wis. 2d 808 (1978)

C. John Doe proceeding not proceeding in Ct of record and John Doe Judge not equivalent of a Ct

D. Doctrine of separation of powers set forth in Wis Constitution not violated by Judge performing both investigative and judicial duties

968.26

E. Initiated by any person, sworn or unsworn, who complains to Judge that person has reason to believe crime committed within Judge's jurisdiction

Wis JI-Cr SM-12

1) Complainant need not know who committed crime

St ex rel Reimann v Cir Ct
214 Wis. 2d 605 (1997)

2) Complaint need not establish probable cause but must establish that the complainant has "reason to believe" crime committed

St ex rel Kowaleski v Dist Ct
254 Wis. 363 (1949)

F. Not necessary that name "John Doe" be used, and actual person's name may be used in subpoenas

1) Named person has no right to attend proceedings or inspect DA's transcript

968.26(5)

G. Proceeding to last no more than six months, but may be extended

2. Role of Judge in John Doe Proceedings

St ex rel Reimann v Cir Ct
214 Wis. 2d 605 (1997)

A. Initial role of Judge to determine whether complainant has "reason to believe" crime was committed

1) Objective test

2) Allegation must be supported by objective, factual assertions, not mere opinions or conclusions

Naseer v Miller (In re John Doe Petition)
2010 WI App 142, ¶ 13
329 Wis. 2d 724

3) Analysis must be limited to four corners of the complaint. Ct cannot take extraneous matters into account until later in the process

St ex rel Unnamed Persons v St (In re John Doe Proceeding)
2003 WI 30, ¶ 30
260 Wis. 2d 653

4) Denial of petition subject to review under § 809.51 supervisory writ procedures

968.26(1m)

B. If petition is filed by DA, Judge shall convene a John Doe proceeding

968.26(2)(am)

C. If a petition filed by someone other [illegible], Judge shall, upon finding "reason to believe," refer matter to DA

968.26(2)(am)

1) If complaint is about DA, refer to a different prosecutor

968.26(2)(b)

2) DA has 90 days from referral to issue charges or to refuse to do so

968.26(2)(b)

3) If the DA refuses to issue charges, DA shall provide the referring Ct with all law enforcement records pertaining to the matter along with written statement why DA is refusing to charge

968.26(2)(b)

4) Judge shall convene a John Doe proceeding if Judge determines it "necessary to determine if a crime has been committed" after considering law enforcement reports, records, DA reports, and any other records the Judge finds relevant

St v Washington
83 Wis. 2d 808, 824
(1978)

D. Must conduct self as neutral detached magistrate in determining probable cause

St v Washington
83 Wis. 2d 808, 823
(1978)
St v O'Connor
77 Wis. 2d 261, 284
(1977)

1) Ensure procedural fairness

St v Washington
83 Wis. 2d 808 (1978)

2) Judge's behavior should not impair ability to make independent determination of probable cause

   a. Communication between complainant or prosecutor and Judge as to substance of proceedings should be made part of record

St v Cummings
199 Wis. 2d 721 (1996)

3) May also issue search warrants

St ex rel Unnamed Persons v St (In re John Doe Proceeding)
2003 WI 30
260 Wis. 2d 653

4) May disqualify counsel for witness, but must give reasons on record for doing so, which may be sealed

968.26
St ex rel Robins v Madden
2009 WI 46
317 Wis. 2d 364

St v Washington
83 Wis. 2d 808 (1978)
St ex rel Long v Keyes
75 Wis. 288 (1889)

E. Affirmative duty to examine complainant and those witnesses that the Judge determines to be necessary and appropriate to ascertain whether a crime was committed and by whom

St v Washington
83 Wis. 2d 808, 823 n.10
(1978)

1) Although usual for DA to initiate and conduct proceedings, § 968.26 does not require it, nor does it set forth DA's duties with regard to the conduct of the hearing

St ex rel Hipp v Murray
2008 WI 67
310 Wis. 2d 342

2) Exclusive power to subpoena any witness or document requested by DA or deemed necessary

969.01(3)
St v Brady
130 Wis. 2d 443 (1986)
St v Brady
118 Wis. 2d 154
(Ct. App. 1984)

a. Authority of John Doe Judge to issue material witness warrant under § 969.01(3) questionable since John Doe not necessarily a "felony criminal proceeding" as required

Custodian of Records for LSTB v St
2004 WI 65
272 Wis. 2d 208
amended and reconsideration denied
2004 WI 149
277 Wis. 2d 75

b. Subpoena for documents must be based on probable cause

St ex rel Jackson v Coffey
18 Wis. 2d 529 (1963)

3) Witness need not be informed of substance of complaint, nature of proceedings, or extent of inquiry

St v Hanson
2019 WI 63, ¶ 35
387 Wis. 2d 233

a. Although a witness is not subject to custodial interrogation and therefore *Miranda* warnings are not required, the Wis Supreme Ct recommends addressing a witness in accordance with Wis JI-Cr SM-12

Wis JI-Cr SM-12

b. Advise witnesses on record of right against self-incrimination

c. Advise witnesses on record that testimony may be used to support issuance of warrant

Wis JI-Cr SM-12

d. Advise witnesses on record of right to consult Atty before answering questions

968.26

4) Advise Atty representing witness that Atty not allowed to examine client or cross-examine any witnesses or argue before Judge

968.26(4)

F. Secrecy of proceedings

St v Unnamed Def
150 Wis. 2d 352 (1989)
St ex rel Stevens v Cir Ct
141 Wis. 2d 239 (1987)

1) Proceedings presumptively open, although John Doe Judge may close to public for compelling reasons in exercise of sound discretion

2) CAUTION: Because of presumption that all Ct proceedings are open to the public, any order for secrecy should balance any compelling need for secrecy against public interest in open proceedings

In re Wis Family Counseling Servs v St
95 Wis. 2d 670
(Ct. App. 1980)

3) Factors to consider

a. Keeping John Doe target from fleeing

b. Keeping arrested Def from knowledge that might cause Def to flee

c. Preventing Defs from collecting perjured testimony for trial

d. Preventing certain interested persons from thwarting inquiry

e. Preventing certain interested persons from tampering with prospective testimony or secreting evidence

f. Freeing witnesses from threat of immediate retaliation

g. Preventing testimony that may be mistaken, untrue, or irrelevant from becoming public

St v Cummings
199 Wis. 2d 721 (1996)

4) The above factors also apply if there is a request to seal a search warrant

Recommendation

5) If secret, proceedings should be on record so violations of Ct orders can be enforced by contempt power

6) Attys and witnesses should be told on record at beginning, close, or adjournment of testimony not to discuss proceedings or testimony with anyone

a. Should be advised that violation of secrecy order will subject person to contempt penalties

St ex rel Indiv Subpoenaed at John Doe Case v Davis
2005 WI 70
281 Wis. 2d 431

b. John Doe Judge has no authority to require counsel for a witness to take an oath of secrecy when proceedings are already subject to secrecy oath

968.26
972.08(1)
St ex rel Newspapers Inc v Cir Ct
65 Wis. 2d 66 (1974)

G. If immunity to be granted, motion of DA and actual grant of immunity must be in open Ct

H. Compelling testimony

968.26

1) Motion by DA to compel witness to testify made in John Doe proceeding

St ex rel Newspapers Inc v Cir Ct
65 Wis. 2d 66 (1974)

2) Ct's ruling on motion itself made in open Ct

a. Details of DA's motion (such as questions witness to be compelled to answer) should NOT be recited in open Ct

b. State only that DA made motion to compel testimony of named witness and that motion granted or denied, then proceed with John Doe

972.08(2)

3) Upon witness's continued refusal, Ct may summarily order confinement until witness willing to give testimony or until John Doe investigation concluded, but in no case exceeding 1 year

a. Person confined not admitted to bail pending determination of appeal taken from order of confinement

St v Brady
118 Wis. 2d 154
(Ct. App. 1984)

4) John Doe Judge may not issue material witness warrant

a. John Doe not a felony criminal proceeding

I. Access to testimony

971.23(1)

1) Def has access to any statement Def made that State has, including testimony in John Doe proceeding

2) DA has access to transcript

a. Only that portion of testimony used at prelim or trial open to inspection

971.23(1)

3) If DA calls John Doe witness to testify at trial, Def must be allowed to use that witness's John Doe testimony to impeach

a. Allowed even if DA does not use John Doe testimony

968.26(5)(c)

J. Any search warrants related to the proceedings must be issued by a different Judge

3. Disposition

968.26(2)(d)

A. In matters petitioned by others than a DA, Judge may issue a complaint if Judge finds sufficient credible evidence to warrant a prosecution

968.26(2)(d)

1) Judge may consider investigative reports and records in addition to sworn testimony

2) Standard is essentially whether Judge can find prosecutive merit for the matter to proceed

St v O'Connor
77 Wis. 2d 261 (1977)

B. Judge other than Judge hearing testimony may issue complaint

St v Unnamed Def
150 Wis. 2d 352 (1989)

1) Judge issuing criminal complaint does not offend doctrine of separation of powers, even though executive branch (DA) typically issues criminal complaints

C. **Warrant issued for arrest of accused**

D. **Findings of Ct should be made on record**

4. John Doe Problems

St v Washington
83 Wis. 2d 808, 822
(1978)

A. John Doe investigation limited to subject matter of complaint on which proceedings commenced, and thus relevancy issues arise

1) Test is that information sought must be connected with the suspected criminal activity in some manner

St v Hoffman
106 Wis. 2d 185, 204–07
(Ct. App. 1982)

2) John Doe proceeding not to be used as discovery tool to aid prosecution after complaint issued

a. Writ of prohibition may issue to prevent John Doe proceeding from exceeding lawful scope

b. If lawful scope exceeded, suppression of witness's testimony and its fruits is appropriate remedy

St v Washington
83 Wis. 2d 808, 829 n17
(1978)

B. Sec. 968.26 grants power to issue subpoenas but does not specifically authorize John Doe Judge to force compliance

1) Sec. 785.02 provides that Ct of record may find any person in contempt who disobeys any process or lawful order of Ct

967.02(1t), (2m)

a. See distinction between definitions of Judge and Ct

St v Washington
83 Wis. 2d 808 (1978)

2) Orders to be enforced by contempt proceedings should be issued by Ct of record

3) Judge other than John Doe Judge should preside at contempt proceedings

Custodian of Records for LTSB v St
2004 WI 65
272 Wis. 2d 208
amended and reconsideration denied
2004 WI 149
277 Wis. 2d 75

4) Custodian of documents may challenge subpoena as overly broad and therefore unreasonable

C. If DA did not make complaint or refuses to assist, or if DA's office involved, may have to appoint Special Prosecutor

St v Cummings
199 Wis. 2d 721 (1996)

D. Even while a John Doe proceeding is in progress, the DA maintains the ability to issue a complaint

St v O'Connor
77 Wis. 2d 261 (1977)

E. Discretion of Ct to permit public officials with law enforcement responsibilities to be present during examination and to permit access to transcript

F. Conflicts caused by multiple representation of witness by Atty

1) Threatens secrecy of John Doe

2) Witnesses to be granted immunity may be giving testimony against other witnesses represented by same Atty

St v Miller
160 Wis. 2d 646 (1991)

3) Ct has authority to disqualify counsel when actual or serious potential conflict of interest exists

   a. Over client's objection, and

   b. Over adequate waiver of right to conflict-free representation

   c. Must give reasons on record for doing so, which may be sealed

St ex rel Unnamed Persons v St (In re John Doe Proceeding)
2003 WI 30
260 Wis. 2d 653

G. John Doe Judge rendering judicial decision must create record for possible review

St ex rel Unnamed Persons v St (In re John Doe Proceeding)
2003 WI 30
260 Wis. 2d 653

CR 49
INQUESTS

1. Purpose and Venue ..... CR 49-3
2. Who May Order ..... CR 49-3
3. Hearing Procedure ..... CR 49-3
4. Juror Selection ..... CR 49-4
5. Inquest Witnesses ..... CR 49-5
6. Compelled Testimony ..... CR 49-5
7. Jury Instructions ..... CR 49-6
8. Verdict ..... CR 49-6
9. Confidentiality of Record ..... CR 49-6

1. Purpose and Venue

A. To inquire how a person died

979.04(1)
St ex rel Kurkierewicz v Cannon
42 Wis. 2d 368 (1969)

B. Called when DA has reason to believe a death was caused under circumstances indicating

1) A type of homicide

2) Criminal negligence

3) Suicide

C. May be in any Cty where a trial may be held if criminal charges

2. Who May Order

979.04(1), (2)
Mohrhusen v McCann
62 Wis. 2d 509 (1974)
St ex rel Kurkierewicz v Cannon
42 Wis. 2d 368 (1969)

A. DA

B. Circuit Ct Judge

1) Judge may issue order if there is finding that DA abused discretion by not initiating inquest

C. Request of coroner or medical examiner made via DA

3. Hearing Procedure

979.05(1)

A. Conducted by Judge or Circuit Ct Comm'r (CCC)

979.04(1)
Mohrhusen v McCann
62 Wis. 2d 509 (1974)

B. DA must appear and represent the State and present all evidence relevant and material to the inquiry

979.05(2)

C. Conducted in front of a jury unless otherwise requested by DA or coroner or medical examiner

D. Jury shall consist of six (6) jurors

E. Jurors should be summoned in same manner as set out in §§ 756.04, 756.05

979.05(5)

F. Ct may give appropriate preliminary instructions

G. DA may make statements to jurors at any time during the proceedings on evidentiary or procedural matters

979.05(6)
St ex rel Schulter v Roraff
39 Wis. 2d 342 (1968)

H. Court may order proceeding to be secret on own or at DA's request

979.08(2)

I. Burden of Proof

1) Finding shall be based on probable cause

4. Juror Selection

979.05(3)

A. Judge or CCC shall conduct the voir dire (See CR 23, Sec. 4, this volume)

B. Prospective juror may be excused for cause (See CR 23, Sec. 6, this volume)

C. DA may also question potential jurors

D. Alternate jurors may be selected if deemed necessary

E. Jurors sworn via oath or affirmation in § 979.05(4)

979.05(7)

F. Jurors to be compensated as under § 756.25

5. Inquest Witnesses

979.06(1)

A. To be subpoenaed by Ct at request of DA or coroner or medical examiner

979.06(2)

1) May include the calling of expert witnesses

979.06(3)

B. Witnesses may have counsel present, however

1) They cannot conduct own questioning

2) They cannot argue to Ct or jury

C. Witnesses shall be sworn by oath set out in § 979.06(4)

979.06(5)

D. Testimony must be reduced to writing or recorded

979.06(6)
814.67

E. Inquest witnesses to be reimbursed as any other witnesses

6. Compelled Testimony

979.07(1)(a)

A. Witnesses may assert the privilege against self-incrimination with the following results

1) DA may grant immunity

2) Testimony may be compelled

979.07(2)

3) If witness refuses, may be subject to contempt under Ch 785

979.07(1)(b)

B. Any immunity is subject to § 972.085 restrictions

C. See Ch 26, this volume, for discussion of immunity

979.08(1)

A. Prepared and submitted by DA

B. The final instructions shall be compiled by Ct

979.08(1)

C. Instructions shall include those criminal offenses for which the Ct believes a reasonable jury might return a verdict

979.08(3)

D. Written instructions to be sent in with the jury during deliberations

8. Verdict

979.08(3)(a), (b)

A. Verdict form must allow consideration of either of following

1) Death caused by criminal means

   a. Specific crime(s), and

   b. Name of person(s) who committed crime

2) Death caused by accident, natural causes, suicide, or an act privileged by law

979.08(2), (4)

B. Verdict shall be unanimous, in writing, and signed by all jurors

C. Effect of verdict

979.08(5)

1) Advisory

2) Up to discretion of DA

9. Confidentiality of Record

979.08(7)

A. Record may remain secret unless ordered open by Ct upon petition of DA

CR 50

SEXUALLY VIOLENT PERSON COMMITMENT

1. General Provisions ..... CR 50-3
2. Procedure ..... CR 50-5
3. Petition for Supervised Release ..... CR 50-18
4. Petition for Discharge ..... CR 50-22
5. Collateral Attack ..... CR 50-24
6. Notice Concerning Release or Discharge..... CR 50-25

1. General Provisions

A. Nature and Purpose

St v Carpenter
197 Wis. 2d 252 (1995)
St v Post
197 Wis. 2d 279 (1995)

1) A civil commitment procedure primarily intended to provide treatment to offenders and protect public from dangerous sex offenders who meet the commitment criteria

St v Rachel
224 Wis. 2d 571
(Ct. App. 1999)

2) Rules of Civil Procedure apply

St v Burgess
2003 WI 71, ¶ 34
262 Wis. 2d 354

3) Lack of confidentiality is not violation of equal protection

980.01

B. Definitions

1) "Department" means the Department of Health Services (DHS)

980.01(1b)

2) "Acts of sexual violence" means conduct that constitutes the commission of a sexually violent offense (SVO)

980.01(7)

3) "Sexually violent person" (SVP) means

a. Person who has been convicted of an SVO, OR

b. Person who has been adjudicated delinquent for an SVO, OR

c. Person who has been found not guilty of or not responsible for an SVO by reason of insanity or mental disease, defect, or illness, AND

from mental disorder that [illegible] person will engage in one or more acts of [illegible] violence

980.01(1m)

- "Likely" means more likely than not

St v Laxton
2002 WI 82
254 Wis. 2d 185

- Proof of lack of control is established by nexus between mental disorder and dangerousness

4) "Sexually violent offense" means any of the following

980.01(6)(a)
St v Irish
210 Wis. 2d 107
(Ct. App. 1997)

a. Any crime specified in §§ 940.225(1), (2), or (3), 948.02(1) or (2), 948.025, 948.06, 948.07, or 948.085

980.01(6)(am)

b. An offense that before June 2, 1994, was a crime under Wis law, and that is comparable to any crime specified in para. a. above

980.01(6)(b)

c. Any crime specified in §§ 940.01, 940.02, 940.03, 940.05, 940.06, 940.19(2), (4), (5), or (6), 940.195(4) or (5), 940.30, 940.305, 940.31, 941.32, 943.10, 943.32, or 948.03 that is determined, in a proceeding under § 980.05(3)(b), to have been sexually motivated

980.01(6)(bm)

d. Any offense that before June 2, 1994, was a crime under Wis law, that is comparable to any crime specified in para. c. above, and that is determined in a proceeding under § 980.05(3)(b), to have been sexually motivated

980.01(6)(c)

e. Any solicitation, conspiracy, or attempt to commit a crime under para. a., b., c., or d. above

980.01(5)

5) "Sexually motivated" means that one purpose for an act is for actor's sexual arousal or gratification or for sexual humiliation or degradation of the victim

St v Adams
223 Wis. 2d 60
(Ct. App. 1998)

6) "Mental disorder" means a congenital or acquired condition affecting the emotional or volitional capacity that predisposes a person to engage in acts of sexual violence

980.01(9)

7) "Substantially probable" means "much more likely than not"

St ex rel Pharm v Bartow
2007 WI 13, ¶¶ 39–40
298 Wis. 2d 702

C. Jurisdiction

St v Burgess
2003 WI 71, ¶ 34
262 Wis. 2d 354

1) Enrolled tribal member committing offenses on reservation subject to proceedings

2) Interstate Agreement on Detainers (IAD) and extradition waivers do not prevent Wis from commencing Ch 980 commitment proceeding

3) Person convicted of sexually violent offense and incarcerated in Wis is subject to this State's broad scope to prosecute Ch 980 proceedings

980.02

2. Procedure

A. Petition—Civil Ct action

980.02(1)

1) Who may file

a. Dept of Justice (DOJ), at request of agency with jurisdiction over person

St v Bell
2006 WI App 30, ¶ 17
289 Wis. 2d 275

- DA can request DOC to seek a second opinion on whether person is sexually violent

St v Byers
2003 WI 86, ¶ 43
263 Wis. 2d 113

b. If the DOJ does not file, then the following may file petition:

- DA of Cty of conviction, delinqu… adjudication, or § 971.17 finding
- DA of Cty where discharged offender may reside or be placed upon discharge
- DA of Cty in which the person is in custody

980.02(1)(b)3.

980.02(1m)
St v Stanley (In re Commitment of Stanley)
2014 WI App 89, ¶ 23
356 Wis. 2d 268

2) Petition must be filed before person is released or discharged

St v Gilbert
2012 WI 72, ¶¶ 17, 28
342 Wis. 2d 82

3) Petition may be filed after person's parole or extended supervision is revoked

4) Petition shall allege

a. Person satisfies any of the following

- A conviction of an SVO; or
- Delinquent for an SVO; or
- Not guilty of an SVO by reason of mental disease or defect

St v Zanelli
212 Wis. 2d 358
(Ct. App. 1997)

b. Person has a mental disorder

c. Person is dangerous to others because mental disorder makes it likely that person will engage in acts in sexual violence

5) Petition must state particulars showing SVP, prior offenses, sexual motivation for offenses

St v Zanelli
212 Wis. 2d 358
(Ct. App. 1997)

6) Need not be sworn

St v Wolfe
2001 WI App 136
246 Wis. 2d 233

7) Need not be served on subject before initial appearance

980.02(4)

B. Venue

1) Petition may be filed in Circuit Ct of

a. Cty of original conviction, delinquency adjudication, or commitment order

980.02(5)

- DOJ may always file petition in Circuit Ct of Dane Cty

b. Cty of intended placement or residence

c. Cty where in custody, imprisoned, or currently placed

980.02(6)

NOTE: Juv Ct does not have jurisdiction over a petition filed under § 980.02 alleging that a person who was adjudicated delinquent as a child is SVP

980.105

2) DHS to determine Cty of residence using following factors

a. The voluntary concurrence of physical presence with intent to remain in a place of fixed habitation

b. Presence equals prima facie evidence of intent to remain

c. Apply paras. a. and b. above to facts that existed at time SVO occurred that resulted in the sentence, placement, or commitment in effect at time of this petition

980.034

3) Within 20 days after probable cause hearing, subject may seek change of venue for trial. Time may be extended for cause

a. Motion for change must be supported by affidavit showing nature of prejudice; petitioner may file counter-affidavit

b. Only one change allowed

c. Ct may order change of location or select jury from second Cty

C. Ct's duty upon filing of petition

980.04(1)

1) Review to determine whether immediate detention order needed

a. Issue detention order if probable cause to believe person eligible to be committed as an SVP

b. Order detained person to Juv correctional facility or secured RCCCY until determination of status at trial

980.04(2)(a), (b)1., 2.

2) Hold probable cause hearing within 30 days after filing if not detained; if subject detained, then within 10 days after scheduled release or discharge date. Time may be extended for good cause shown

Recommendation

a. Make finding on record that good cause has been shown

980.03(1)

3) Notice

a. Give person reasonable notice of all hearings

980.03(1)

b. Other parties may be designated by Ct to receive notice

St v Spaeth (In re Commitment of Spaeth)
2014 WI 71, ¶ 15
355 Wis. 2d 761

4) If the requirements of § 980.02 are satisfied at the filing of the petition, petition is not invalidated if the predicate conviction is reversed

D. Def's Rights—Not necessarily same rights as those afforded criminal Def

St v Luttrell
2008 WI App 93
312 Wis. 2d 695

1) Sec. 971.14 competency examination is not available to person subject to Ch 980

St v Brown
215 Wis. 2d 716 , 727
(Ct. App. 1997)

2) Substitution: governed by civil substitution rules, § 801.58(1)

St v Matthews
2021 WI 42, ¶¶ 20, 24
397 Wis. 2d 1

Request is timely if filed before Ct hearing a preliminary contested matter, which is a substantive issue going to the ultimate merits of the case; not procedural

980.03(2)(a)

3) Counsel: Ct shall refer person to SPD, who shall appoint counsel regardless of indigency

980.03(2)(b)

4) Remain silent

St v Mark
2006 WI 78, ¶ 2
292 Wis. 2d 1

a. Pre-petition right against self-incrimination is not ordinarily self-executing, and must be invoked

b. Statement to be excluded must be

- Testimonial,
- Compelled, and
- Incriminating

St v Harrell
2008 WI App 37
308 Wis. 2d 166

c. Fifth Amendment protection applies to derivative use of statements in expert reports

St v Lombard
2004 WI 95
273 Wis. 2d 538

St v Kienitz
221 Wis. 2d 275
(Ct. App. 1998), *aff'd*,
227 Wis. 2d 423 (1999)

d. For example, State may use statements made at pre-petition interview that do not expose subject to future criminal prosecution

e. Includes refusal to be examined by expert psychiatrists or psychologists

980.038(2)(a)

f. State can comment on refusal to be interviewed

908.03(2)(c)

5) Present and cross-examine witnesses

980.03(3)

6) Jury may be requested by the subject of the petition, the person's Atty, or the petitioner. Ct may order jury trial on own motion

980.03(3)

7) Unanimous verdict

980.03(2)(d)

8) All hearings reported by Ct reporter

980.031(3), (4)

9) Independent exam at Cty expense

a. Includes right of reasonable access to subject for exam

980.08(3), (4)
St v Thiel
2004 WI App 225
277 Wis. 2d 698

b. Ct must appoint an examiner. Indigent Def cannot choose

E. Probable cause hearing

980.04(2)

1) Time

980.04(2)(a), (b)1.

a. Within 30 days after filing petition

980.04(2)(a), (b)1.

b. Unless time extended by Ct for good cause shown on its own motion, motion of any party, or stipulation of parties

980.04(2)(b)2.

c. If person named in petition is in custody under a sentence, dispositional order, or commitment, and if probable cause hearing will be held after the date the person is scheduled to be released or discharged, then:

- Probable cause hearing shall be held no later than 10 days after the scheduled release or discharge date
- Unless time extended by Ct for good cause shown on its own motion, motion of any party, or stipulation of parties

980.04(2), (3)

2) Determine whether probable cause exists that person is sexually violent

980.04(3)

a. If probable cause found

- Take into custody
- Order transfer within reasonable time to appropriate facility specified by DHS for SVP evaluation by DHS

980.05(1)

- Schedule trial within 90 days

980.04(3)

b. If no probable cause, dismiss the petition

980.038(3)

3) Hearing may be conducted by telephonic and audiovisual means, if available, unless good cause to contrary is shown

a. Ct reporter must be in simultaneous voice communication with all parties

b. Proceeding must be in open Ct or other place reasonably accessible to public

4) Motions

980.038(1)(a)

a. Within 30 days after probable cause hearing, motion challenging jurisdiction or competency of the Ct or timeliness of the petition shall be filed under § 980.02

b. Failure to file waives challenges to petition filed under § 980.02

980.038(1)(b)

c. Ct may exercise personal jurisdiction over person named in § 980.02 petition, although person not served under § 801.11(1) or (2) with verified petition or order for detention and person has not had probable cause hearing

F. Discovery: § 980.036 governs discovery; Ch 804 does not apply

1) Upon demand, prosecuting Atty shall disclose to person subject to Ch 980 and permit the person to inspect and copy or photograph all of the following in prosecuting Atty's possession, custody, or control:

a. Subject's written or recorded statements concerning allegations and other matters at issue

b. Names of witnesses to subject's written and oral statements

c. Written summary of and list of witnesses to subject's oral statements that are to be used at trial or proceeding

d. Subject's criminal record

e. List of witnesses to be called at trial or proceeding, and witnesses' addresses; disclosure does not apply to rebuttal or impeachment witnesses

f. Relevant written or recorded statements and criminal records of witnesses

g. Results of scientific, physical, mental, psychological testing that prosecuting Atty intends to use at trial or proceeding and raw data used in testing

St v Jendusa
2021 WI 24, ¶¶ 30–31, 36
396 Wis. 2d 34

- Including Wisconsin-specific risk assessment data

h. Any physical or documentary evidence to be offered at trial or proceeding

i. Exculpatory evidence

2) Upon demand, subject must disclose to the prosecuting Atty and permit inspection, copying, and photographing of the following in subject's or subject Atty's possession, custody, or control:

a. List of witnesses to be called at trial or proceeding, and witnesses' addresses; disclosure does not apply to rebuttal or impeachment witnesses

b. Any relevant written or recorded statements, including § 980.031(5) reports, of witnesses to be called at trial or proceeding

c. Known criminal records of witnesses

d. Results of scientific, physical, mental, psychological testing that subject intends to use at trial or proceeding and raw data used in testing

e. Any physical or documentary evidence to be offered at trial or proceeding

980.036(3m)

3) Disclosure must be made within a reasonable time after the probable cause hearing and within a reasonable period of time before the trial or proceeding

980.036(9)

4) Sanctions for failure to disclose:

a. Exclude witnesses and evidence unless good cause shown

b. Grant a recess or adjournment of trial or proceeding

c. In addition, Ct may advise Jury, subject to § 980.036(4), of failure to disclose or of untimely disclosure

5) Miscellaneous

980.036(4) a. No comment on failure to call a disclosed witness

980.036(5) b. Ct may order the production of any item or raw data intended to be introduced at trial or proceeding for testing or analysis subject to terms and conditions

980.036(6) c. Ct may issue a protective order

980.036(7) d. Ct may inspect documents, in camera, to mask or delete irrelevant matter

980.036(8) e. Parties have a continuing duty to disclose

980.05 **G. Trial**

1) Held within 90 days after finding of probable cause

2) One or more continuances allowed for good cause

a. Ct's own motion

b. Motion of party

c. Stipulation

St v Zanelli
212 Wis. 2d 358
(Ct. App. 1997)

St v Franklin
2004 WI 38, ¶¶ 14–16
270 Wis. 2d 271
St v Kaminski
2009 WI App 175, ¶¶ 10–12, 322 Wis. 2d 653

3) Rules of evidence in criminal actions apply

a. Except "other acts" not governed by § 904.04(2). Evidence must be relevant and not outweighed by unfair prejudice

4) Jury trial, if requested, within 10 days after probable cause hearing or upon Ct's own motion; otherwise, trial to Ct

a. If one party withdraws request for jury trial, two persons who did not make request must consent (the subject of the petition, subject's counsel, DA, or DOJ)

980.05(2m)(a), (b)
805.08(3)
St v Treadway
2002 WI App 195
257 Wis. 2d 467

b. Civil rules apply, but four peremptory strikes rather than three

980.05(2m)(c)

c. At any time before verdict, parties may, with Ct approval, stipulate that jury be less than 12

5) Burden of proof on petitioner

980.05(3)(a)

a. Must prove beyond reasonable doubt that subject is SVP

b. If State alleges sexually motivated offense as basis for petition, State must prove beyond reasonable doubt that act was sexually motivated

c. Evidence that subject of petition has prior convictions for an SVO NOT sufficient to establish beyond a reasonable doubt that the person has a mental disorder

St v Laxton
2002 WI 82
254 Wis. 2d 185

d. Person's serious difficulty in controlling his/her behavior is established by proof that person's mental disorder predisposes such person to engage in acts of sexual violence establishing it is more likely than not that such person will again commit such acts

St v Bush
2005 WI 103
283 Wis. 2d 90

e. In evaluating the offender's dangerousness, it is not necessary to prove a recent overt act when there is a break in the offender's incarceration and the offender is re-incarcerated for nonsexual behavior

St v Budd
2007 WI App 245, ¶ 18
306 Wis. 2d 167

f. Evidence of general screening process for initiation of Ch 980 proceedings is not relevant to whether specific respondent is SVP

6) Telephonic and audiovisual testimony permitted upon showing of good cause under § 807.13(2)

980.031(5)

7) Professional witnesses are not subject to sequestration, and may not testify unless they submit a written report to both parties at least 10 days before proceeding

St v Madison
2004 WI App 46
271 Wis. 2d 218
St v Pletz (In re Commitment of Pletz)
2000 WI App 221
239 Wis. 2d 49

H. Unanimity requires only that jury find person has mental disorder. Jury need not agree on which mental disorder. It is Trial Ct's discretion whether to submit a general or special verdict

980.06

I. Commitment

RMC Form CR-236

1) If Ct or jury determines person is an SVP, Ct must order subject committed to custody of DHS until person is no longer an SVP

Recommendation

a. Enter commitment order as soon as possible after judgment

2) Commitment order shall specify that the person be placed in institutional care

3) Commitment to institutional care

a. SVO can be placed

980.065(1m)

- At the secure mental health facility established under § 46.055 at Wisconsin Resource Center established under § 46.056 or

980.065(2)

- At secure mental health unit or facility provided by DOC

St v Anthony DB
2000 WI 94
237 Wis. 2d 1

4) Order for involuntary medication must follow provisions of Ch 51

a. Order for involuntary medication expires unless it receives the appropriate periodic review

J. Postcommitment requirements

980.063

1) Must provide a biological specimen to state laboratories for DNA analysis

980.07(1)–(3)

2) Reexamination must be conducted within 12 months after date of initial commitment and again thereafter at least once each 12 months to determine whether Ct should consider supervised release or discharge

a. Person has right to retain qualified expert to conduct reexamination; or Ct can appoint if person requests appointment and is indigent

St v Jones
2013 WI App 151, ¶ 6
352 Wis. 2d 87

b. When report submitted to Ct, person has right to an Atty and person shall be referred to appointing agency

c. Examiner must place copy of written report in person's records and provide to Ct within 30 days after reexamination

d. Ct that committed person may order reexamination at any time while person is subject to commitment order

980.038(4)

3) Section 809.30 governs appeals by person committed. Section 808.04(4) and Chs 808 and 809 govern appeals by State

980.07(4), (6)

4) Annual treatment progress report and any reexamination report shall be filed with the Ct, committed person, DOJ, or DA, and with person's Atty as soon as retained or appointed

A. Time frame

980.08

1) Any person committed to institutional care may petition committing Ct to modify its order if

980.08(1)
St v Williams
2001 WI App 263
249 Wis. 2d 1

a. It is at least 12 months after initial commitment order, or

b. It is at least 12 months since the most recent release petition was denied, or since supervised release was denied under § 980.09(4), or

c. It is at least 12 months after most recent order for supervised release was revoked

980.08(1)

NOTE: The director of the facility where the person is placed may file a petition at any time.

980.08(3)(a)

2) Within 20 days after receipt of petition, Ct must appoint one or more examiners at Cty expense to furnish written report within 60 days after appointment unless extended for good cause by Ct

a. If an examiner within 6 months before petition supports supervised release, Ct may appoint that examiner

St v Alger (In re Commitment of Alger)
2013 WI App 148, ¶ 1
352 Wis. 2d 145
aff'd, 2015 WI 3
360 Wis. 2d 193

b. Sec. 907.02(1) does not apply to commitment petitions filed before February 1, 2011

c. If examiner believes supervised release appropri necessary services and treatment should be deta

St v Thiel
2004 WI App 225
277 Wis. 2d 698

d. Petitioner entitled to appointment by Ct of "qualified and available" examiner paid by Cty under § 980.031(3) [formerly § 980.03(4)]

980.08(4)(a)

3) Ct, without jury, must hear petition within 120 days after Ct-appointed examiner's report filed with Ct unless Ct for good cause extends time

B. Hearing

980.08(4)(cj)

1) Burden is on petitioner to establish criteria by clear and convincing evidence

980.08(4)(c)

2) In making decision, Ct may consider

a. Nature and circumstances of the behavior that was the basis for the petition

b. Person's mental history and present mental condition

c. Where person will live and how support will be provided

d. Access to treatment

- Decision involving person who is a serious child sexual offender may not be based only on fact that person is proper subject for pharmacological treatment or that person is willing to participate in such treatment

980.08(4)(cg)

3) Ct may not authorize supervised release unless all of the following are met:

a. Person is making significant progress in treatment and progress can be sustained while on supervised release

b. It is substantially probable person will not engage in an act of sexual violence while on supervised release

c. Treatment that meets the person's needs and qualified provider are reasonably available

d. Person can be reasonably expected to comply with treatment and rules

e. A reasonable level of resources can be provided for the placement, supervision, and ongoing treatment needs that are required for safe management of person

980.08(4)(dm)1., 4.

4) Ct shall order Cty of person's residence, as determined by DHS under § 980.105, to prepare report to be submitted to DHS within 120 days after the order

980.08(4)(f)

5) Ct shall direct DHS to use report to prepare supervised release plan and submit within 30 days after Cty submitted its report; for good cause, Ct may grant one 30-day extension

980.08(4)(g)

6) If plan is inadequate because of treatment options, Ct shall order DHS to prepare another plan under § 980.08(4)(f)

980.08(4)(g)
St v Thiel
2012 WI App 48
340 Wis. 2d 654

7) Ct shall approve the plan if it meets the person's treatment needs and the community's safety needs

C. Municipal involvement

Town of Mentor v St
2021 WI App 85, ¶¶ 27–29, 400 Wis. 2d 138

1) Ch 980 does not provide for municipal involvement in selecting placement residence

2) Municipality is not foreclosed from intervening under limited circumstances

D. Supervised release

980.08(6m)
St v Milw Cty
2006 WI App 229, ¶ 5
297 Wis. 2d 339

1) Order for supervised release places person in custody and control of DHS

2) Ct shall restrict the person to person's residence for the first year, except for activities approved by DHS under § 980.08(9)(a)

St v Milw Cty
2006 WI App 229, ¶ 41
297 Wis. 2d 339

3) DHS must arrange for control, care, and treatment of person in least restrictive manner consistent with requirements of person and in accordance with plan for supervised release approved by Ct. Trial Ct has power to "fashion a remedy," which includes rejecting proposed solutions that are inadequate, unworkable, or unsanctioned

St v Morford
2004 WI 5, ¶ 56
268 Wis. 2d 300

4) State may seek to modify supervised release order

5) Ct must notify municipal police dept and sheriff for the municipality and Cty in which person will be residing, before release

St v Schulpius
2006 WI 1, ¶¶ 39, 42–43
287 Wis. 2d 44
St v Sprosty
227 Wis. 2d 316, 320, 336–37 (1999)

6) Although failure to locate placement for committed individual ordered released is a procedural-due-process violation, the remedy is not release. Ct may order, under appropriate circumstances, DHS to create a facility to accommodate the individual

980.08(7)

E. Revocation of supervised release

980.08(7)(a), (b)

1) DHS may detain person or petition for revocation if it believes that person has violated or threatened to violate any condition or rule of supervised release or that person is threat to safety of others

980.08(7)(c)

2) DHS must submit a statement to Ct and regional office of SPD within 72 hours after the detention showing probable cause of detention and a petition to revoke supervised release

980.08(7)(d)

3) Ct shall hold hearing on petition within 30 days unless waived by detained person

a. Person may be detained in jail/center or returned to institutional care

980.08(8)

b. State has burden of proof by clear and convincing evidence that any rule or condition of release has been violated or that safety of others requires that supervised release be revoked

St v VanBronkhorst
2001 WI App 190
247 Wis. 2d 247

- Notice of alleged violations required to comply with due process

c. Ct may revoke order and place person in appropriate institution

St v Burris
2002 WI App 262
258 Wis. 2d 454, *aff'd*,
2004 WI 91
273 Wis. 2d 294

d. If revoked because "safety of others requires," Ct shall not consider alternatives to revocation

4. Petition for Discharge

980.09(1)

A. Committed person may petition for discharge at any time

980.09(1)
St v Arends
2010 WI 46
325 Wis. 2d 1
St v Hager
2018 WI 40
381 Wis. 2d 74

B. Ct shall deny the petition without a hearing unless the petition or the record contains facts from which Ct or jury would likely conclude that the person's condition has changed so that the person no longer meets the SVP criteria (1) since the most recent order denying the discharge on the merits; or (2) since the date of initial commitment if there has not been a previous hearing on the merits of discharge

1) Parties may use experts to support their respective positions. Ct may appoint examiners under § 980.09(1m)(d)

St v Alger (In re Commitment of Alger)
2013 WI App 148, ¶ 1
352 Wis. 2d 145, *aff'd*,
2015 WI 3, ¶ 4
360 Wis. 2d 193

2) Sec. 907.02(1) does not apply to petitions filed before February 1, 2011

980.09(1m)
St v Arends
2010 WI 46
325 Wis. 2d 1

3) Counsel shall be appointed

980.09(2)
St v Arends
2010 WI 46
325 Wis. 2d 1
St v Hager
2018 WI 40
381 Wis. 2d 74

4) In reviewing the petition, the Ct may conduct a hearing to determine whether the person's condition has sufficiently changed such that a Ct or jury would likely conclude that the person no longer meets the criteria for commitments as SVP

St v Talley
2017 WI 21, ¶¶ 27, 35, 39
373 Wis. 2d 610

a. In the review under § 980.09(2), the Ct may consider the record, including evidence introduced at the initial commitment trial or at most recent trial on the petition for discharge, and any past and current reports, relevant facts in petition and State's response, and other documents in support of the parties' positions

980.09(2)

b. If Ct determines that record does not contain facts from which Ct or jury would likely conclude the person no longer meets the criteria for commitment, Ct shall deny the petition

980.09(2)

c. If Ct determines that the record does contain facts from which a Ct or jury would likely conclude the person no longer meets the criteria for commitment, Ct shall set the matter for trial

St v Ermers
2011 WI App 113, ¶ 34
325 Wis. 2d 1

d. "Condition has changed" includes any change in the petitioner and any change in professional knowledge and research if that change could result in petitioner not meeting the SVP criteria

St v Richard (In re Commitment of Richard)
2014 WI App 28, ¶ 1
353 Wis. 2d 219

e. New research must be coupled with application to petitioner

St v Talley
2017 WI 21, ¶¶ 34–35, 39
373 Wis. 2d 610
St v Schulpius
2012 WI App 134
345 Wis. 2d 351

f. Expert's opinion must be based on new fact, new research, or new professional knowledge

980.09(3)

C. Trial shall be held within 90 days after the determination that the petition is sufficient

980.09(3)
St v Talley (In re Commitment of Talley)
2015 WI App 4, ¶ 35
359 Wis. 2d 522

1) State has burden by clear and convincing evidence that the person meets the criteria for commitment as SVP

980.01(2)
St v Stephenson (In re Commitment of Stephenson)
2020 WI 92, ¶ 2
394 Wis. 2d 703

a. Expert testimony not required to meet burden on future dangerousness because the qualifying mental disorder predisposes a person to engage in acts of sexual violence

980.09(4)

2) If Ct or jury determines the State has not met its burden, the person shall be discharged

980.09(5)

3) Ct may stay the discharge not longer than necessary, but not longer than 10 working days to comply with notice requirements under § 980.11(2) & (3)

980.09(4)

4) If Ct or jury is satisfied that State has met its burden, Ct shall proceed under § 980.08 to determine whether commitment should be modified to supervised release, unless the person waives consideration of the § 980.08(4)(cg) criteria

980.09(4)

5) If consideration of § 980.08(4)(cg) is waived, waiver is a denial of supervised relief

St v Allison
2010 WI App 103, ¶ 18
329 Wis. 2d 129

6) Summary judgment under § 802.08 is not available. Options are to deny petition or hold hearing

980.095

D. Trial Procedure

1) Jury of 6 may be requested by DA or DOJ, whichever filed the petition, or by the petitioner or petitioner's Atty. Jury is waived unless requested within 10 days after Ct's determination that Ct or jury would likely conclude that person's condition has sufficiently changed

2) Juries shall be selected and treated as in civil actions

3) Peremptory challenges shall begin with the State. If any party declines to challenge, the challenge shall be cast by the clerk by lot

4) No verdict shall be valid unless at least 5 of the jurors agree

5) Motions after verdict may be made without further notice upon receipt of the verdict

St v Alger (In re Commitment of Alger)
2015 WI 3, ¶ 4
360 Wis. 2d 193

6) Discharge petition is not subject to expert witness requirements of § 907.02(1) if underlying commitment proceeding commenced before February 1, 2011; petition is not a special proceeding or an action

5. Collateral Attack

St v Bush
2004 WI App 193
276 Wis. 2d 806
aff'd on other grds
2005 WI 103
283 Wis. 2d 90

A. *State v Escalona-Naranjo*, 185 Wis. 2d 168 (1994), governs collateral attack on underlying commitment

6. Notice Concerning Release or Discharge

A. DHS shall notify the following if a person released or discharged

1) Victim

2) Adult member of victim's family, if victim died

3) Adult member of victim's family, if victim under 18

4) DOC

B. Notice to be postmarked at least 7 days before release or discharge

CR 51: JUVENILE/ADULT MATTERS

1. Original Jurisdiction of Adult Court ..... CR 51-1
2. Jurisdiction by Waiver from Juvenile Court to Adult Court ..... CR 51-3
3. Adult Court Options for Sentencing Under Juvenile Justice Code ..... CR 51-4
4. Expunction ..... CR 51-5

1. Original Jurisdiction of Adult Court

§ 938.02(1)
St v Sanders
2018 WI 51
381 Wis. 2d 522

A. "Adult," for purposes of investigating or prosecuting a person who is alleged to have violated a state or federal criminal law or any civil law or municipal ordinance, means a person who has attained 17 years of age at the time of charge

§ 938.183(1)(a)
St v Wright
218 Wis. 2d 52
(Ct. App. 1998)

B. Juv adjudicated delinquent and alleged to have committed offenses of battery by prisoner or assault by prisoner, while placed in a Juv correctional facility, a Juv detention facility or a secured RCCCY, or who has been adjudicated delinquent and is alleged to have committed battery to an aftercare agent

§ 938.183(1)(ar)

1) Juv alleged to have committed offense that could be joined under § 971.12(1) with offense governed by **Sec. B.**

§ 938.183(1)(b)
St v Hinkle
2019 WI 96
389 Wis. 2d 1

C. Juv alleged to have violated any criminal law if previously waived and convicted in any Adult Ct or previously waived and proceedings pending in any Adult Ct from any other Cty

§ 938.183(1)(c)

D. Juv alleged to have violated any criminal law and Juv previously convicted in Adult Ct of offense over which Adult Cts have original jurisdiction or proceedings pending in Adult Ct for such an offense

§ 938.183(1)(am)

E. Juv alleged to have attempted or committed 1st-degree intentional homicide, or alleged to have committed 2nd-degree intentional homicide or 1st-degree reckless homicide on or after 10th birthday

§ 938.183(1)(ar)

1) Crim Ct also has jurisdiction over any offense joinable under § 971.12(1)

F. Juvs specified in Secs. B.–E. above are subject to provisions of Criminal Code, including criminal penalties, except

§ 938.183(1m)(a)

1) If Juv under age of 15, may only be held in Juv detention or Juv portion of Cty jail

§ 970.032

G. Determination of Adult Jurisdiction of a Juvenile

§ 970.032(1)

1) If Adult Ct determines no probable cause for an original jurisdiction offense, the Ct shall dismiss the case and discharge the Juv

§ 970.032(2)
§ 971.31(13)
St v Toliver
2014 WI 85
356 Wis. 2d 642
St v Geyser
2020 WI App 58
394 Wis. 2d 96

2) If Adult Ct finds probable cause at prelim as to an original jurisdiction offense, or upon motion of the Juv in a misdemeanor case when the basis for adult jurisdiction is prior adult conviction or waiver, then it must determine whether to retain jurisdiction of Juv or transfer jurisdiction to Juv Ct (commonly referred to as "reverse waiver")

St v Kleser
2010 WI 88
328 Wis. 2d 42
St v Verhagen
198 Wis. 2d 177
(Ct. App. 1995)
RMC Form CR-223

3) Adult Ct shall retain jurisdiction unless Juv proves by preponderance of evidence that

§ 970.032(2)
§ 971.31(13)

a. If convicted, Juv could not receive adequate treatment in the criminal justice system

b. Transferring jurisdiction to Juv Ct would not depreciate the seriousness of the offense, and

c. Retaining jurisdiction is not necessary to deter Juv or other Juvs from similar violations

St v Kleser
2010 WI 88, ¶ 84
328 Wis. 2d 42

4) Juv may present evidence to supplement facts establishing probable cause, to put offense in context, but Juv may not seek to contradict offense charged

§ 938.18

2. Jurisdiction by Waiver from Juvenile Court to Adult Court (See Juvenile Benchbook, JV 5, Sec. 3)

§ 938.18(1)(a)

A. Juv age 14 or over alleged to have done any of the following

1) Manufactured, distributed, or delivered controlled substance [§ 961.41(1)]

2) Committed felony murder [§ 940.03], 2nd-degree reckless homicide [§ 940.06], 1st- or 2nd-degree sexual assault [§ 940.225(1) or (2)], taking hostages [§ 940.305], kidnapping [§ 940.31], burglary while armed or using explosive or engaging in battery [§ 943.10(2)], robbery by use or threat of use of dangerous weapon or item appearing to be dangerous weapon [§ 943.32(2)], or robbery of a financial institution [§ 943.87]

§ 938.18(1)(b)

B. Juv age 14 or over alleged to have committed, at the request of or for the benefit of a gang [§ 939.22(9)], a violation that would be felony under Ch 961 or Chs 939–948

§ 938.18(1)(c)

C. Juv age 15 or over alleged to have violated any State criminal law

St v Pablo R
(Int of Pablo R)
2000 WI App 242
239 Wis. 2d 479

D. Juv of any age who absconds and returns as an adult may be waived

St v Vairin M
(In Int of Vairin M)
2002 WI 96
255 Wis. 2d 137

E. Juv Ct may not reconsider its waiver order after criminal complaint filed unless Adult Ct first transfers case

St v Bergwin
2010 WI App 137
329 Wis. 2d 737
St v Becker
74 Wis. 2d 675 (1976)

F. State may not intentionally delay charge until after Juv "ages up" (i.e., becomes old enough to be subject to Adult Ct jurisdiction) to manipulate system and avoid Juv Ct jurisdiction

St v Phillips
2014 WI App 3
352 Wis. 2d 493

G. Adult Ct must remand all counts of waived case to Juv Ct if Juv Ct lacked competency to waive any count

3. Adult Court Options for Sentencing Under Juvenile Justice Code

§ 938.183(1m)(c)
RMC Form CR-224

A. If Criminal Ct does not reverse waive Juv, but Juv found to have committed lesser or joined offense (but not offense giving Criminal Ct original jurisdiction to which it was joined), Criminal Ct shall find Juv delinquent and impose Juv disposition if any of following apply

§ 938.183(1m)(c)1.

1) Criminal Ct finds Juv committed lesser offense or joined offense that is NOT

   a. Violation of § 940.20(1) or (2m) or § 946.63 [battery by prisoner, battery to aftercare agent, or assault by prisoner] "under circumstances described in § 938.183(1)(a),"

   b. Attempt to violate § 940.01 [attempted 1st-degree intentional homicide] and is not a violation of § 940.02 or § 940.05 [1st-degree reckless or 2nd-degree intentional homicide] "under the circumstances described in § 938.183(1)(am)" and

   c. Offense for which Juv Ct could waive jurisdiction

      - Examples in which Juv would be found delinquent and have Juv disposition imposed

        — Juv accused of battery by prisoner and disorderly conduct but only found to have committed disorderly conduct

        — 12-year-old Juv accused of 1st-degree intentional homicide but only found to have committed homicide by negligent handling of a dangerous weapon

§ 938.183(1m)(c)2.

2) Criminal Ct finds Juv committed lesser offense or joined offense that IS

a. Violation of § 940.20(1), (2m), or § 946.43 "under circumstances described in § 938.183(1)(a)," that is an attempt to violate § 940.01 or a violation of § 940.02 or § 940.05 "under circumstances described in § 938.183(1)(am)" or

b. A "waivable offense," but Criminal Ct determines, after a consideration of the waiver criteria under § 938.18, that Juv has proved by clear and convincing evidence it would be in best interests of Juv and public to find him/her delinquent and impose Juv disposition

c. Example: 14-year-old Juv accused of 1st-degree intentional homicide, but found guilty of 2nd-degree intentional homicide

4. Expunction

§ 938.355(4m)

A. 17-year-old's right to request expunction of delinquency adjudications applies to adjudications under § 48.12, 1993 Stats., or § 938.12

1) 2005 Wis Act 344 supersedes *St v Jason JC*, 216 Wis. 2d 12 (Ct. App. 1997), so Juv adjudicated delinquent for offense committed before July 1, 1996, may also request expunction

Recommendation

B. Application for expunction of delinquency adjudication should be made to Juv Ct

§ 973.015

C. Adult Ct may order expunction of criminal record of individual convicted of offense committed when individual was under 25 years old if

1) Maximum penalty for offense is six years or less

2) Individual successfully completes sentence, and

3) Ct determines that individual will benefit and society will not be harmed by expunction

Note: Certain Class H and Class I felonies excepted.